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AN ALTERNATIVE TO THE BAIL SYSTEM: PENAL CODE SECTION 853.6

California Penal Code, section 853.6 provides that a misdemeanor may be released by a law enforcement officer¹ if he signs a written promise to appear before a magistrate on a specified date.² The issuance of a traffic citation in lieu of jailing a suspected traffic violator is the most common application of this type of procedure, but in the case of Penal Code violators, the procedure is rarely used.³ The purpose of this note is to discuss the problems raised by the statute's use, examine the merits of the statute, and determine the reasons for its limited use.⁴

Where Penal Code Section 853.6 is Used

A comparison of four representative California law enforcement agencies⁵ using procedures based on section 853.6 illustrates that a police release procedure may be adopted to the needs of most communities.

¹ CAL. PEN. CODE § 853.6 is not to be confused with CAL. PEN. CODE § 853.1 which permits a county, city, or city and county to authorize law enforcement officers to release a suspected local ordinance violator on his promise to appear in court. See 44 CALIF. L. REV. 561 (1956). Many law enforcement officials have thought local authorization was necessary before police could exercise the discretion provided in CAL. PEN. CODE § 853.6. Letter From Thomas Cahill, Chief of the San Francisco Police Dep't, to Gordon H. Winton, Jr., Chairman, Assembly Committee on Criminal Procedure, Feb. 26, 1964. Interviews With Jacob Jessup, Chief of Public Safety, Sunnyvale, and his Staff, in Sunnyvale, Calif., during Nov. 1966 [hereinafter cited as Interview With Chief Jessup]; Telephone Interview With Frank Coakley, District Attorney of Alameda County, Oct. 20, 1966.

² There are two sections in the Penal Code which permit the police to release a suspect who is arrested for the violation of a Penal Code misdemeanor. CAL. PEN. CODE § 853.6(b) requires that the police give the suspect a minimum of five days before he is required to make an appearance in court while CAL. PEN. CODE § 849(b)3 has no such requirement. The Attorney General has suggested the following: "The scope of the procedures set forth in 853.6 is meant to be coextensive with the right to release on citation given by section 849. [Section 853.6 sets] forth the procedure to be followed." 45 OPS. CAL. ATT'Y GEN. 56, 58 (1965).

³ A recent survey suggests CAL. PEN. CODE § 853.6 is used less than one tenth of one % of the time with Penal Code violators. 22 CAL. ASSM. INTERIM COMM. REP., No. 8 ON CRIMINAL PROCEDURE 95 (1965). The writer discussed the report with Dr. A. LaMont Smith, Special Consultant on Arrest Records, Bail, and Citation Procedure to the Assembly Interim Committee on Criminal Procedure, on Dec. 1, 1966 in Berkeley, Calif. Dr. Smith did not believe that the use of the statute with relation to Penal Code violators had increased substantially in the last two years.

⁴ There is little case law on this subject. How and when CAL. PEN. CODE § 853.6 should be used is a decision for the policeman, not the court. Therefore the statute can be analyzed only by reference to case studies and personal interviews. For a discussion of the importance of police discretion in the administration of criminal justice and the necessity for a closer examination of its role see Packer, *Who Can Police the Police*, VIII N.Y. Rev. of Books No. 3, Sept. 8, 1966, p. 10.

⁵ The four law enforcement agencies investigated were the Pittsburg Police Dep't, Sunnyvale Public Safety Dep't, Richmond Police Dep't, and the Contra Costa County Sheriff's Office. The information on the procedure followed in Pittsburg was based on

After a person is arrested in Pittsburg, California, he is taken to the station house where frequently⁶ he is released on his written promise to appear in court on the following day.⁷ Ninety-seven per cent of the suspects who are so released appear in court as agreed.⁸ This high appearance rate, however, might be attributed to the community's small size, which theoretically permits the police to become familiar with many residents.⁹ Since the police only release suspects they

extensive Interviews With Sal Jimno, Chief of Police, Pittsburg, and his Staff, in Pittsburg, Calif., during Oct. and Nov. 1966 [hereinafter cited as Interview With Chief Jimno] and a close examination of the department's arrest records. The information on the procedure followed in Sunnyvale was based on extended Interviews With Chief Jessup and a close examination of the department's arrest records. The information on the procedure followed in Richmond was based on extensive Interviews With Charles Brown, Chief of Police, Richmond, and his Staff, in Richmond, Calif., during Oct., Nov. and Dec. 1966 [hereinafter cited as Interview With Chief Brown] and a close examination of the department's arrest records. The information on the procedure followed in the Contra Costa County Sheriff's Office was based on extensive Interviews With John Nejedly, District Attorney of Contra Costa County, his Staff and Members of the Contra Costa County Sheriff's Office, in Martinez and Richmond, Calif., during Oct., Nov., Dec. and Jan. 1966-1967 [hereinafter cited as Interview With District Attorney Nejedly] and a close examination of the arrest records of the Mount Diablo Municipal Court District, an area in which the Contra Costa County Sheriff's Office does extensive police work. A more extended discussion of the release procedure that each law enforcement agency has developed may be found in Appendix I *infra*.

⁶ An examination of the Pittsburg Police Dep't records for the month of Sept. 1968 demonstrates the frequency with which a police release procedure is used. Out of 108 arrests, 28 suspects were arrested as felons or on warrants, and the police did not have the authority to release them. There were 48 releases on the suspect's promise to appear. 8 were released on either cash bail or bond. Only 22 suspects who the police had the authority to release were not released. Of these 22, 8 did not have local addresses, or means of identifying themselves, and 10 were in such a state of intoxication that they were still in jail when court convened.

⁷ This is contrary to the procedure outlined in CAL. PEN. CODE § 853.6, which gives the suspect a minimum of five days to appear. None of the police agencies (*i.e.*, Pittsburg, Sunnyvale, Richmond, and Contra Costa County Sheriff's Office) were concerned with this five day period; they merely required that the suspect appear in court when it was convenient. The police chiefs believe that they are releasing pursuant to CAL. PEN. CODE § 849(b)3, which does not have a five day waiting period. See note 2 *supra*.

District Attorney Nejedly, prosecuting attorney for Contra Costa County and the cities of Richmond and Pittsburg, suggested that suspects waive the five day period when they sign the agreement to appear in court on the following day. Interview With District Attorney Nejedly. However, CAL. PEN. CODE § 853.6 does not provide for such waiver. District Attorney Nejedly suggested that if such statutory authority is necessary, the statute should be amended to correspond with the practice.

⁸ This figure does not include drunks. When drunks are included in the total figure, only 90.5% appear. Appendix I *infra*. Drunks are excluded in evaluating appearance data because many of the drunks who are released are apparently not aware, because of their demented condition caused by the continuous consumption of alcohol, that they made a promise to appear.

⁹ In 1931 the National Commission on Law Observance and Enforcement suggested in 4 REPORT ON PROSECUTION 91 (commonly called the Wickersham Report): "[I]n rural days, the court or court's advisors were sufficiently acquainted with the few persons brought into court to know with a fair degree of accuracy, whether they would

believe to be trustworthy, they are reasonably sure the released suspect will appear.

Sunnyvale, approximately four times the size of Pittsburg, has increased its population by one-third in a recent four year period,¹⁰ yet it is also using a police release procedure based on section 853.6. Because of the community's size and growth rate the police have little opportunity to develop the long term contact that may exist in Pittsburg and thus seldom know the people they arrest. Immediately after arrest, all suspects are taken to the station house where they fill out an "O.R." form,¹¹ as required by the Sunnyvale Public Safety Department. The information thus supplied on the "O.R." form gives the police background on the individual. A shift supervisor¹² evaluates this information, and if he believes the suspect will appear in court on his written promise, the suspect is released. Very few suspects are not released, and during the month of January, 1966, of those released only one failed to appear as agreed.¹³

Richmond, a community of 80,000, also uses a police release procedure based on section 853.6. After the suspect is taken to jail, the supervising officer examines the arresting officer's report and decides whether or not the suspect should be released on his promise to appear in court. Almost all suspects who have identification and a California address are released; ninety-eight per cent of those released appear in court.¹⁴

Richmond has a low growth rate with a high population turn over. The city has areas predominantly populated by minority groups as well as areas exclusively populated by caucasians. The socio-economic make-up of the community varies from one neighborhood to another¹⁵ and causes problems which apparently do not exist in either Pittsburg or Sunnyvale; yet Richmond is achieving as effective results with a police release procedure as are Sunnyvale and Pittsburg.

In Contra Costa County, the Sheriff's Office has developed a release procedure similar to that used with traffic law violators. Rather than jailing the suspected misdemeanor, the arresting deputy merely issues a citation when the suspect

be dependable or whether they need be detained or put on bail." In addition, this report suggested that because of increasing population in urban complexes, the government must set up a formalized structure to determine whether or not an individual should be released pending his trial. *Id.* at 92. In 1967 the President's Commission on Law Enforcement and Administration of Justice reiterated the need for a formalized structure to determine whether or not a person should be released pending his trial. "Bail projects should be undertaken at the State, county, and local levels to furnish judicial officers with sufficient information to permit the pretrial release without financial condition of all but that small portion of defendants who present a high risk of flight or dangerous acts prior to trial." *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 132 [hereinafter cited as 1967 CRIME COMMISSION REPORT].

¹⁰ See 1966 CALIFORNIA INFORMATION ALMANAC 413 (Salitore).

¹¹ "O.R." stands for "own recognizance."

¹² A shift supervisor is a Captain in the Sunnyvale Public Safety Department. He is immediately responsible for all police and fire problems in the city of Sunnyvale.

¹³ Appendix I *infra*. Sunnyvale's arrest reports reflect that there is little crime in the community: drunkenness in and around automobiles is the city's major crime problem. See Arrest Reports, Sunnyvale Public Safety Dep't, Jan. 1966.

¹⁴ This figure does not include drunks released by the police. Appendix I.

¹⁵ See U. S. DEP'T OF COMMERCE, BUREAU OF CENSUS, 1960, CENSUSES OF POPULATION AND HOUSING, SAN FRANCISCO-OAKLAND, CALIF. STANDARD METROPOLITAN STATISTICAL AREA 46-48 (1961).

signs a written promise to appear in court.¹⁶ In contrast to the procedures used by Pittsburg, Sunnyvale, and Richmond the suspect is not even taken to the station house. The main criteria for release is whether the suspect has identification, and during a six month period of the suspects released only one failed to appear.¹⁷

The high rate of court appearance by suspects released¹⁸ in the four diverse communities of Pittsburg, Sunnyvale, Richmond, and Contra Costa County suggests that a system of release based upon police discretion may be utilized in almost any community. It makes little difference whether the community is large or small, rich or poor. However, the mere fact that suspects, once released, will usually appear for trial does not necessarily mean that a release procedure based on section 853.6 will be unquestioningly accepted by all law enforcement agencies.

¹⁶ The 1967 CRIME COMMISSION REPORT 132 suggested that the procedure followed by the Contra Costa County Sheriff's Office is experimental. The procedure, however, is not experimental since it is the adopted policy of the county sheriff's office after two years of experimentation and is followed with all misdemeanor arrests. The three other police agencies are following substantially the same procedure with one slight variation: all suspected misdemeanants are brought to the station house where they are fingerprinted and then released on their promise to appear. Chiefs Jimno and Brown believe that the failure to fingerprint suspects is the major defect of the Sheriff's Office procedure. Interview With Chief Jimno; Interview With Chief Brown. All of the arrest and conviction records that are kept by the F.B.I. and the Calif. Bureau of Criminal Investigation and Identification are based on fingerprints. Under the Sheriff's Office procedure an arrest record is never made for the Federal and State authorities, and frequently in the case of conviction, conviction records are never made when the guilty party is given a suspended sentence. District Attorney Nejedly, who operates under this procedure also recognizes that this is its greatest failure. Interview With District Attorney Nejedly. It would seem that until some provision is made for positive identification of a suspect at some stage in the criminal process, the use of a police release procedure at the scene of the crime will be exceedingly limited. CAL. ASSM. B. 824, 1967 Reg. Sess. provides a possible solution to this problem.

¹⁷ Appendix I *infra*.

¹⁸ The fear that released suspects will not appear for trial may have some basis. E. M. Toothman, Chief of Police, Oakland, Calif., in a Letter to Gordon H. Winton, Jr., Chairman, Assembly Committee on Criminal Procedure, Feb. 17, 1964, said the following: "Through our experience in traffic citations and our current program of citing for animal ordinance violations, we have been noticing an ever increasing tendency by the public to fail to assume their obligations and ignore their written promises to appear. This failure undermines the heart of any citation program and increases very drastically the amount of necessary police work."

The success of a police release program depends upon the treatment of the citation by the community. In the case of a traffic citation or an animal ordinance violation, the suspect is usually expected to forfeit bail and not appear in court. If the citation is considered a revenue-producing device and if the consequences of a failure to appear are not emphasized, there will be a high rate of failures to appear. If the arrested person understands the significance of his release and realizes the consequences for his failure to appear, the procedure suggested by CAL. PEN. CODE § 853.6 will apparently be a success. The interest that the judges have in the program's success and their willingness to punish those who fail to appear is a necessary ingredient to the success of any police release procedure. This apparently was the intent of the legislature which enacted CAL. PEN. CODE § 853.6. CAL. PEN. CODE § 853.7, enacted at the same time as CAL. PEN. CODE § 853.6, makes failure to appear as promised a separate offense.

Value of Penal Code Section 853.6

Before a law enforcement agency will adopt a police release procedure, it must be convinced that it will derive some benefit therefrom. A release procedure based on section 853.6 has some obvious benefits to the police as well as the community. There is a reduction in the cost of prisoners' meals, lighting, laundry, and janitorial services in the jail facilities. Less time is spent inspecting, transporting, and caring for prisoners. The elimination of the custodial duties that result from extended confinement of suspects permits the police to spend a greater percentage of their resources on the prevention and investigation of crime.¹⁹

There are other less obvious advantages to the use of a police release procedure which may, in the long run, be of much greater value to the police than the mere saving in manpower and money. When a discretionary release procedure is used, the police are no longer subjected to the temptation of favoritism toward certain bailbondsmen seeking referrals.²⁰ In a community where complaints of police brutality are a major problem, there may be a substantial reduction in the number of complaints with the adoption of a police release procedure.²¹ It has been suggested that the main cause of brutality complaints is the confinement of the individual.²² The longer one is in the custody of the police, the greater is his propensity to claim he has been brutally treated.²³ Finally, suspects are beginning to realize that cooperation with the police will frequently hasten their release from custody. Cooperation, in this context, means neither self-incrimination nor confession, but rather consists of less resistance to the initial arrest and subsequent confinement.²⁴

¹⁹ Letter From Robert Bowers, Chief of Police, El Cerrito, Calif., to District Attorney John Nejedly, Sept. 24, 1965. This letter reflected the opinion of every law enforcement official, using a procedure based on CAL. PEN. CODE § 853.6, who was interviewed; yet not one of these officials could state how much money or manpower had been saved by the use of the statute. This lack of data appears to be a characteristic of the administration of criminal justice. The following observation was made by the 1967 CRIME COMMISSION REPORT 13: "It is impossible to state accurately what proportions of police time are spent on the different sorts of police work. This lack of firm data of almost every kind has been the greatest obstacle to the Commission's work, in many instances requiring it to base its recommendations on fragmentary information, combined with the experienced judgement of those who have worked in this field." This report attributes many of the problems in the administration of criminal justice to congestion in the jails and courts. *Id.* at 11-12. The report continues: "Much of the congestion throughout the system, from police stations to prisons, is the result of the presence in the system of offenders who are there only because there is no other way of dealing with them." *Id.* at 14. Since a police release procedure gets the offender out of the system much quicker, it would seemingly make the system operate more efficiently.

²⁰ Interview With Chief Jessup. A bail bondsman in Contra Costa County criticised the police release procedure by suggesting that the police might request money from suspects as a condition to their release. Interview With William Cooper, Nov. 29, 1966, in Martinez, Calif.

²¹ Interview With Chief Brown.

²² *Ibid.*

²³ *Ibid.*

²⁴ In Interviews during Oct. 1966, a Member of the Richmond Police Dep't described this cooperation. Frequently when a suspect is brought to jail he is uncooperative.

The Bail System

A release procedure based on section 853.6 substantially deviates from the conventional bail procedure.²⁵ Traditionally police have been permitted to arrest on the basis of reasonable cause, leaving the question of releasing the suspect from custody to the discretion of the magistrate.²⁶ If the magistrate determines that there is reasonable cause for arrest, he sets a bail, which the suspect must post in order to be released prior to his trial.

What advantages do the police and the community derive from the conventional bail procedure? It has been argued that the bail-release procedure serves the police and the community in three ways. First, it helps to assure the suspect's appearance in court.²⁷ Also when bail is set so high that the suspect cannot afford it, such bail prevents the suspect from committing a crime while awaiting trial²⁸ and aids police in convicting the accused of the crime with which he is charged.²⁹

He is immediately put into a cell, and the jailer tells him that his chances of an earlier release are enhanced if he cooperates. At this point the suspect will usually calm down and cooperate while the jailer processes him. For a more extended discussion of this procedure see Appendix I *infra*.

²⁵ For a thorough discussion of the role that bail has played in the common law see generally Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959 (1965) [hereinafter cited as Foote].

²⁶ Generally the police, who know the most about a suspect, are not given the discretion to release him prior to his trial, while the judicial officers, who usually know the least about the suspect, are given this exclusive authority. There seems to be a strong irrational commitment to the idea that only a judicial officer can intelligently exercise this discretion. See, e.g., Veto Message of former Governor Earl Warren, June 22, 1951, 4 CAL. ASSM. J. 6435 (1952). Even the more modern release programs, which contemplate the abolition of the requirement of financial security, still reserve an important role for the magistrate. See 1967 CRIME COMMISSION REPORT 132.

Most state legislatures do not permit their police to release suspects on their promise to appear. LAFAYE, ARREST 204 (1965). A *Citation* procedure authorizing release of the suspect at the scene of the crime is rare. "The only such provisions found are: Cal. Penal Code §§ 853.1 to 853.8 (Supp. 1962); Del. Code Ann. tit. 11, § 1909 (1953); Ill. Rev. Stat. chap. 38, § 107-112 (1963); N.H. Rev. Stat. Ann. § 594.14 (1955); R.I. Gen. Laws Ann. § 12-7-11 (1956)." *Id.* at 204 n. 133. *Station House Release* procedure is also uncommon. "In the United States such provisions were found only in Cal. Penal Code § 849 (Supp. 1962); Del. Code Ann. tit. 11, § 1910 (1953); R.I. Gen. Laws Ann. § 12-7-12 (1956)." *Id.* at 205 n. 134.

²⁷ Foote *supra* note 25, at 994.

²⁸ Address by Daniel J. Freed, Acting Director of the Office of Criminal Justice, U. S. Dep't of Justice, reprinted in NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, BAIL AND SUMMONS: 1965, 41-47 (1966) [hereinafter cited as BAIL AND SUMMONS: 1965]. The 1967 CRIME COMMISSION REPORT 10 suggested the following: "The persistence of money bail can best be explained not by its stated purpose but by the belief of police, prosecutors, and courts that the best way to keep a defendant from committing more crimes before trial is to set bail so high that he cannot obtain his release."

²⁹ Professor Packer of the Stanford Law School has suggested that many law enforcement officials believe that "It is likely that a significantly higher percentage of defendants who now plead guilty would elect to stand trial if they could be at liberty pending trial. People who know that they are guilty tend to accept their punishment if, in order to gamble on the off-chance of an acquittal, they have to spend weeks or months

If the suspect is in police custody while awaiting trial, the state is assured that he will be present for that trial. This confinement, however, is detrimental to the suspect.³⁰ Regardless of whether the jailed suspect is innocent or guilty, while confined he is not only prevented from preparing an adequate defense but also punished unfairly.³¹ California has recognized the disadvantages of confinement

in jail awaiting trial. But if they are released pending trial, the incentive to plead guilty is greatly reduced. The main risk is that the increased consumption of time required to litigate cases that do not really need to be litigated would put an intolerable strain on what is already an overburdened process." Packer, *Two Models of the Criminal Process*, 113 U. P. A. L. Rev. 1, 39-40 (1964) [hereinafter cited as Packer]. This suggestion is questionable. According to the records in the Contra Costa District Attorney's Office the conviction rate for drunk driving is over 98%. Most of these convictions resulted from guilty pleas. In 1963, before a pretrial release program was used, 23% pleaded not guilty. In 1965, when a pretrial release program was used, 22% pleaded not guilty. District Attorney Nejedly claims that the percentage of cases going to trial has not increased since the introduction of a pretrial release program. Interview With District Attorney Nejedly.

³⁰ The 1967 CRIME COMMISSION REPORT 131 describes the differences between a released defendant and an imprisoned defendant in the following terms: "A released defendant is one who can live with and support his family, maintain his ties to his community, and busy himself with his own defense by searching for witnesses and evidence and by keeping in close touch with his lawyer. An imprisoned defendant is subjected to the squalor, idleness, and possibly criminalizing effects of jail. He may be confined for something he did not do; some jailed defendants are ultimately acquitted. He may be confined while presumed innocent only to be freed when found guilty; many jailed defendants, after they have been convicted, are placed on probation rather than imprisoned."

³¹ A recent study illustrates the advantages that the freed suspect has over the detained suspect: "Available data indicates that free defendants in fact enjoy a considerable advantage over those who have been detained. In the District of Columbia, a study of 258 convicted defendants showed that 25% of the 83 who had been bailed were released on probation, compared with probation given to only 6% of the 175 who had been jailed. A Philadelphia study of 946 cases produced similar results: only 52% of the bailed defendants were convicted compared with 82% of those jailed. Among the convicted, only 22% of the bailed defendants got prison sentences compared with 59%—almost triple the number—of jail terms for those who had been detained. New York City's 1960 records, as analyzed in the Manhattan Bail Project's Interim Report, found the following comparisons in the felony conviction rate of those at liberty and those in detention prior to trial:

Offense	Convictions	
	Bail	jail
Assault	23%	59%
Grand Larceny	43%	72%
Robbery	51%	58%
Dangerous Weapons	43%	57%
Narcotics	52%	38%
Sex Crimes	10%	14%
Others	30%	78%

In sentencing, the study found these contrasts in the prison terms given to bailed and jailed defendants:

and guarantees that the accused may be released from custody by posting adequate security which will theoretically guarantee his appearance at trial.³² The bail system works well except for those suspects who do not have adequate security to post and thus remain in jail. However, the necessity of requiring financial security is dubious. The four police agencies examined above indicate that generally suspected misdemeanants³³ appeared in court on their promise to appear, and none of these suspects posted financial security.

The prevention of crime is the second justification for keeping a suspect in police custody while awaiting trial.³⁴ This type of confinement can only be effected by setting a bail too high for the accused to post,³⁵ which seems to be justified on the theory that the trial, which determines the suspect's guilt or innocence, is too

	<i>Prison Sentence</i>	
	<i>Bail</i>	<i>Jail</i>
Assault	58%	94%
Larceny	48%	93%
Robbery	78%	97%
Dangerous Weapons	70%	91%
Narcotics	59%	100%
All Other Offenses	56%	88%

The Manhattan study showed that in misdemeanor categories, prison terms were given to 87% of the jailed defendants but to only 32% of those on bail. In a Women's House of Detention survey, there was a 77% rate of conviction among detained women compared to a 40% rate among those bailed." FREED & WALD, *BAIL IN THE UNITED STATES*: 1964, at 46-47 (1964) [hereinafter cited as *BAIL*, 1964].

³² CAL. CONST. art I, § 6. This right does not extend to those accused of a capital offense.

³³ There are other studies which demonstrate that suspected felons will appear on their promise without financial security. See *BAIL AND SUMMONS*: 1965; *BAIL*, 1964. These studies were made in communities which extensively screen the suspects who are released. In contrast, under the procedure used by the four California communities suspected felons are often released by the court on their promise to appear, pursuant to CAL. PEN. CODE § 1318. The law enforcement officials, interviewed, who are using a procedure for misdemeanants based on CAL. PEN. CODE § 853.6 believe that the police release procedure authorized by the statute could be extended to suspected felons with comparable results. See note 56 *infra* and accompanying text.

³⁴ "Roughly a third of the offenders released from prison will be reimprisoned, usually for committing new offenses, within a 5-year period." 1967 CRIME COMMISSION REPORT 45. In a Telephone Interview, Oct. 17, 1966, Robert Burns, Assistant City Attorney for the City of Los Angeles suggested that many released suspects would commit the same offense again and therefore CAL. PEN. CODE § 853.6 is used sparingly by many law enforcement officials. The writer suggested this conclusion to Chief Jessup and Chief Brown and they both agreed with Mr. Burns' conclusion but believed the recidivism problem was not their responsibility. It was the responsibility of the judge and the jury to keep the recidivists out of circulation.

³⁵ A recent California District Court of Appeals case "suggested that either for the safety of the individual or for the protection of society, it may be proper in some instances to deny bail." *Evans v. Municipal Ct.*, 207 Cal. App. 2d 633, 636, 24 Cal. Rptr. 633, 634 (1962). The case is limited to its facts: the defendant was seeking a writ of prohibition to prevent his trial on a drunk driving charge. He had been denied bail for a period of five and a half hours.

slow to protect society.³⁶ Therefore the magistrate, through a summary proceeding,³⁷ must protect society from possible danger.

There are two objections to this theory of detention. There have been no conclusive studies to indicate that a suspect accused of one crime and awaiting trial for that crime is likely to commit another crime when released from custody prior to the trial.³⁸ On the contrary, there is some evidence to indicate that the suspect will not commit a second crime.³⁹ There is also a legal objection to using excessive bail for the purpose of confinement. The California Supreme Court has suggested that "the sole purpose which should guide the Court or judge in fixing the amount of bail in any case in which bail is allowed should always be to secure the personal appearance of the accused to answer the charge against him."⁴⁰

Finally, it is argued that pre-trial confinement plays an important role in the efficient administration of criminal justice.⁴¹ The confined individual is more likely to cooperate with the police and the prosecutor than one who is not in custody.⁴² Although the custodial surroundings of the jail frequently induce the suspect to confess, both the United States and California Supreme Courts have barred the use of any statements psychologically induced from these surroundings.⁴³ Hence the police and the prosecutor may derive only the one benefit of a guilty plea from extended custody before trial.

It has been suggested that guilty pleas are significantly related to pretrial confinement,⁴⁴ and most criminal convictions result from guilty pleas.⁴⁵ In order to

³⁶ For a discussion of the use of bail as a means of effecting preventive detention see generally 79 HARV. L. REV. 1489 (1965).

³⁷ For a discussion of the historical experience that the common law has had with summary proceedings and the inherent danger to civil liberties see the dissenting opinion in *State v. Maier*, 13 N.J. 235, 279-85, 99 A.2d 21, 47-51 (1953).

³⁸ The only evidence indicating recidivism pending trial consists of a hardened criminal committing another crime while awaiting trial or during his trial. See, e.g., Address by Herman Goldstein, Executive Assistant to the Superintendent of Police, Chicago Ill., reprinted in PROCEEDINGS AND INTERIM REPORT NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 151-68 (1965).

³⁹ In the Mount Diablo Municipal Court District, an area where the Contra Costa County Sheriff's Office releases almost all suspected misdemeanants on their promise to appear, Appendix I *infra*, over a six month period, only one suspect committed a second offense between release and trial. Mount Diablo Municipal Court Records, Jan. 1, 1966—June 30, 1966.

⁴⁰ *Ex parte Duncan*, 54 Cal. 75, 77 (1879). The 1967 CRIME COMMISSION REPORT 131 suggests that if bail is used for any other purpose, it is of "dubious legality." Bail varies according to the seriousness of the crime since the magistrate must determine bail on the assumption that the defendant is guilty of the crime with which he is charged. *Ex parte Ryan*, 44 Cal. 555 (1872). Since the defendant's appearance in court may depend on the size of the penalty he faces, the seriousness of the charge must be taken into consideration when bail is set. 1967 CRIME COMMISSION REPORT 131.

⁴¹ Quotation note 29 *supra*.

⁴² See generally LAFAYE, ARREST (1965).

⁴³ *Miranda v. Arizona*, 384 U.S. 436 (1966), affirming *People v. Stewart*, 62 Cal. 2d 571, 43 Cal. Rptr. 201, 400 P.2d 97 (1965).

⁴⁴ Quotation note 29 *supra*.

⁴⁵ "Most defendants who are convicted—as many as 90 per cent in some jurisdictions—are not tried. They plead guilty" 1967 CRIME COMMISSION REPORT 134.

understand how guilty pleas play such an important role in the administration of criminal justice, the arrest records of a large city will be examined. In San Francisco ninety per cent of all those arrested, other than those arrested on warrants, are arrested for misdemeanors.⁴⁶ Seventy per cent of those arrested for felonies either have the charges against them dropped or reduced to a misdemeanor charge.⁴⁷ Therefore well over ninety per cent of those who appear before a magistrate are accused misdemeanants. Most of these misdemeanants are arrested for drunkenness, disturbing the peace, minor assaults, or petty theft.⁴⁸ A substantial number of these cases are disposed of with one hearing and a plea of guilty.⁴⁹ If the defendant pleads not guilty, his trial is delayed for as long as twenty days, and during that time he must remain in jail if he cannot post bail.⁵⁰ Frequently a suspect who pleads not guilty is confined longer while awaiting trial than he would have been had he pleaded guilty and been sentenced. Therefore almost all misdemeanants who cannot afford bail plead guilty.⁵¹

It seems obvious that a different standard of justice exists for those who can afford bail than exists for those who cannot afford bail. Although one author has suggested that the United States Supreme Court will invalidate the bail requirement for release as an unconstitutional denial of equal protection,⁵² a police release procedure based on section 853.6 would seemingly offer an alternative to such Court action. Under such a release procedure the suspect would no longer be induced to plead guilty just because he is poor and cannot afford bail. It would also appear that the extensive use of a police release procedure would cause the conviction rate to substantially decrease. However, in Contra Costa County where a police release procedure is used extensively, the District Attorney's Office has a high conviction rate.⁵³ This result is apparently due in part to the fact that the county's law enforcement agencies spend resources, once used for confinement, on crime prevention and investigation⁵⁴ and that the District Attorney prosecutes only when there is appropriate evidence of the commission of a crime.⁵⁵

⁴⁶ See 1965 ANNUAL REPORT OF THE SAN FRANCISCO POLICE DEPT 72-121.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ San Francisco Municipal Court Records, Dec. 1965.

⁵⁰ *Ibid.* The 1967 CRIME COMMISSION REPORT 129 made the following observation about misdemeanor cases: "Those few cases in which the defendant demands a trial may be inordinately delayed by the unavailability of judges to try cases."

⁵¹ Interviews with Herbert Kutchins, Director of the San Francisco Bail Project, San Francisco, Calif., during Dec. 1966. Although it may be hard to believe that people do not have the money to post the small bail required of a suspected misdemeanor, the 1967 CRIME COMMISSION REPORT 129 made the following observation about the financial ability of misdemeanants: "Almost all plead guilty, and sentence is imposed in such terms as '30 days or \$30.' A large part of the jail population in many cities is made up of persons jailed in default of the payment of a fine."

⁵² See Foote.

⁵³ The conviction rate for felons is 90.7%, compared to a statewide average of 84.2%. (No comparable data is available for misdemeanants.) CAL. BUREAU OF CRIMINAL STATISTICS, 1965 CRIME & DELINQUENCY 70.

⁵⁴ Note 19 *supra* and accompanying text.

⁵⁵ Interview With District Attorney Nejedly. It could be claimed that the conviction rate is high because all of the difficult cases are dropped and many people who normally would have been convicted under a more conventional system are not even being charged.

Problems with Penal Code Section 853.6

Few law enforcement agencies in California use a police release procedure based on section 853.6, but those law enforcement officials who use such a procedure believe that section 853.6 should be substantially changed⁵⁶ and urge that police discretion should be more accurately defined and enlarged.⁵⁷ When an arresting officer believes that a person is guilty of a Penal Code offense, he usually feels that it is necessary to hold him in jail until the magistrate disposes of the case.⁵⁸ It has been suggested that enactment of a definite arrest and release procedure by the legislature more accurately outlining the exercise of discretion authorized by section 853.6 and required of all police departments would provide the policeman with a clear understanding of his role in the administration of criminal justice.⁵⁹

On the other hand, it could be argued that the high conviction rate is due to the better utilization of law enforcement resources which result in better investigations and hence more convictions.

The writer noticed two practices of the law enforcement agencies in Contra Costa County which might explain the high conviction rate. When a person has committed a wrong he is usually punished, but this does not mean that he has been tried. On occasion, in the Mount Diablo Municipal Court District the writer found that petty theft cases were solved in the District Attorney's Office with both the suspect and the complaining witness agreeing to a solution. This practice is permitted by CAL. PEN. CODE § 1378. A second practice is the reluctance of the police to bring charges against a suspect unless they believe that the suspect is guilty and that such guilt *can be proved in court*. In Contra Costa County 68.4% of those charged with felonies *by the police* are convicted as felons in contrast to a statewide average of 42.7%. (No comparable data is available for misdemeanants.) See CAL. BUREAU OF CRIMINAL STATISTICS, 1965 CRIME & DELINQUENCY 46, 70. The police frequently mentioned to the writer that the District Attorney's Office would not prosecute unless there was appropriate evidence of guilt.

The 1967 CRIME COMMISSION REPORT 134 recommended the following: "Prosecutors should endeavor to make discriminating charge decisions, assuring that offenders who merit criminal sanctions are not released and that other offenders are either released or diverted to noncriminal methods of treatment and control by

"Establishment of explicit policies for the dismissal or informal disposition of the cases of certain marginal offenders.

"Early identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required."

⁵⁶ The criticisms of the present statute were made during Interviews With Chief Jimno, Chief Jessup, Chief Brown, and District Attorney Nejedly. Criticism was also voiced by: Judge David Calfee, Presiding Judge of the Richmond Municipal Court, Interview in Richmond, Oct. 24, 1966 [hereinafter cited as Interview With Judge Calfee], Judge Wroy Renaghan, Presiding Judge of the Mount Diablo Municipal Court, Interview in Concord, Nov. 21, 1966 [hereinafter cited as Interview With Judge Renaghan], and Judge Martin Rothenberg, Presiding Judge of the Contra Costa Superior Court, Telephone Interview, Nov. 4, 1966 [hereinafter cited as Interview With Judge Rothenberg].

⁵⁷ See Appendix II *infra*. Judges Rothenberg, Calfee, and Renaghan; Chiefs Jimno and Brown, and District Attorney Nejedly were members of a committee that recommended the procedure in Appendix II *infra*.

⁵⁸ Chief Jessup said that most policemen feel that if they go to all the trouble of capturing a "crook" they do not want to turn him loose. Interview With Chief Jessup.

⁵⁹ Such legislative action has been suggested in Interviews by Judges Rothenberg, Calfee, and Renaghan; and Chiefs Jimno, Jessup, and Brown. Judge Rothenberg went so

Additionally, it is urged that police should have the discretion, in appropriate cases, to release felons as well as misdemeanants on the ground that the basis of the felony-misdemeanor distinction is not important in determining whether an individual will appear in court or continue to be an immediate harm to himself or the community.⁶⁰ These two factors should be the only ones considered in determining whether or not a suspect should be held in jail pending his trial.⁶¹

Conclusion

The California Legislature has provided local law enforcement agencies with the authority to release a suspected misdemeanor on his written promise to appear in court. This is a radical departure from the traditional system of arrest, custody and possible release upon the posting of bail—a system which inherently discriminates against certain economic groups. There is ample evidence that those law enforcement agencies using a release procedure based on section 853.6 have benefited therefrom. There is also some evidence to indicate that most law enforcement agencies could effectively use a police release procedure.

Law enforcement officials realize to a limited extent that the traditional bail procedure not only wastes a great deal of time and money but also tends to discriminate against certain economic groups,⁶² yet this is not apparently known by the public. Nevertheless, these officials believe that the community is deriving substantial benefit from the conventional bail procedure—a belief which is questionable.

Suspects who are released on their promise to appear in court usually appear as promised. Released suspects generally do not commit other crimes while awaiting trial. Convictions are obtained as easily under a police release procedure as under the conventional bail procedure. Substantial benefits are derived from the use of a police release procedure: the police may better utilize their resources

far as to suggest that criminal sanctions be brought against police officers who refuse to exercise the discretion granted by CAL. PEN. CODE § 853.6. Interview With Judge Rothenberg.

⁶⁰ Interviews With Chiefs Jimno, Jessup, and Brown; District Attorney Nejedly; and Judges Rothenberg, Renaghan, and Calfee.

⁶¹ *Ibid.*

⁶² In 1942 a law review article, sponsored by the International Association of Police Chiefs, recommended a statute similar to CAL. PEN. CODE § 853.6 for the following reasons: "Even guilty people should often be released without being brought into court. For example, a police officer sees a man lying in the street dead-drunk. Though the drunkard must be taken to the station for his own protection, by six in the morning he will be sober and ready to go to work. If the officers hold him for court, he is likely to lose his job and to join those on relief.

"Even though the person arrested ought to appear in court for trial and punishment, often he should not be held in jail pending trial. Most people arrested for misdemeanors are local residents who will be placed on probation or given a small fine by the judge. They will not desert their homes and jobs simply because released without bail. To require them to furnish bail adds needlessly to their punishment and often increases the impoverishment of their families and the cost of relief. Besides being expensive to the county or state, detention in jail pending trial causes them similar hardships, and justifies the adage that there is one law for the rich and another for the poor." Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 337 (1942). "The Uniform Arrest Act" was the basis for CAL. PEN. CODE § 849(b)3. See 32 CAL. S.B.J. 607, 609 (1957). CAL. PEN. CODE § 849(b)3 was the forerunner of CAL. PEN. CODE § 853.6.

and improve police-community relations. Notwithstanding these benefits, the police apparently do not wish to abandon the traditional system.⁶³

Since those who suffer the most under the traditional system are criminals rather than respected citizens in the community, there is apparently no great impetus for change. The implementation of a program based on section 853.6 must come from individuals who are willing to question the efficacy of the traditional bail system.⁶⁴

*Patrick J. Maloney, Jr **

APPENDIX I

PITTSBURG: Every person accused of a Penal Code violation in Pittsburg is brought to the police station where he is fingerprinted, and a warrant check is run on him. If there are no outstanding arrest warrants against him, if he is accused of committing a misdemeanor and if he is not an immediate danger to himself or the community, he is released at once. If he is an immediate danger to himself or the community, the police wait until he becomes sober or calm, and then release him. If the suspect is accused of a felony, the police chief, if he believes it is justified, will call the local judge and request permission to release the suspect. If the suspect does not have a local address or positive identification, the police will call anywhere in the Bay Area to get identification. With the exception of felons, the decision concerning release is made by the booking sergeant.

Officers who are involved in the release procedure indicate that they will not release a suspect if he does not cooperate. This cooperation consists of non-resistance to the initial arrest and subsequent custody. The police will not release a suspect who indicates he will either post his own bail or employ a bailbondsman.

An examination of the records of the Pittsburg Justice Court for the period from May 29, 1964, to September 18, 1966 shows the following results:

Offense	Released	Failed to Appear As Promised
Non-Aggravated Assault	37	0
Theft	26	1
Vandalism	35	1
Weapons Crime	26	1
Vice	19	2
Disorderly Conduct	122	5
Drunk Driving	25	2
Curfew	42	3
Drunkenness	438	60
Liquor Laws	173	8
Miscellaneous	25	0

[Some suspects were charged with more than one crime.]

⁶³ In Interviews, in San Francisco, Nov. 1966, Herbert Ellingwood, former Legislative Advocate of the District Attorney's Association, suggested that since a police release procedure is such a revolutionary step, the police will require support of all segments of the community before exercising this discretion.

⁶⁴ The 1967 CRIME COMMISSION REPORT 15 suggested: "The Commission finds, third, that the officials of the criminal justice system itself must stop operating, as all too many do, by tradition or by rote. They must reexamine what they do. They must be honest about the system's shortcomings with the public and with themselves. They must be willing to take risks in order to make advances. They must be bold."

* Member, Second Year Class.

Of the 878 suspects released on their promise to appear in court, only 83 failed to appear as agreed. Only three of these 83 were not subsequently arrested. This tends to indicate that the police are overburdened with the service of arrest warrants. However, the police chief stated that this is not the case since most of the suspects who initially failed to appear did later appear following a telephone call from the court or police department. The police chief believes that many suspects who failed to appear did not understand when they were supposed to appear. Of the 83 who failed to appear, 60 were drunks; arrest warrants were not subsequently served on them because the police have found chronic drunks will eventually be arrested again. The greatest testimony to the system's success is that the police chose to continue the use of a release procedure authorized by section 853.6. Had the police been overburdened with serving warrants, this release procedure would not have been continued.

SUNNYVALE. Sunnyvale follows basically the same procedure as is followed in Pittsburgh. The suspect is taken to the police station where he is booked, fingerprinted, and photographed (when necessary), and a warrant check is run. While this process is being completed, the arresting officer fills out an "O.R." form, which is filled out for every suspect whether he be accused of a felony or a misdemeanor. The form is then given to the shift supervisor who examines it and determines whether or not the suspect is likely to appear in court. The criteria for release frequently consists of merely checking the address of the suspect in the telephone book.

The general policy in Sunnyvale is that persons arrested for misdemeanors are to be released on their own recognizance except in those cases where it appears that the prisoner is likely to harm himself or fail to appear as promised.

If the suspect is not released, the "O.R." form is given to the judge who uses it in determining whether the suspect should be released pending his trial on his own promise to appear or whether he should be released upon posting bail.

Often this entire process is completed before the suspect is placed in a cell. If the suspect demands a call to a bailbondsman, the shift supervisor will not make a decision on the suspect's release until after the bailbondsman has made his decision. Paradoxically, many of the suspects who are released on the security of a bond would be out of jail sooner if they had permitted the shift supervisor to release them on their promise to appear in court. This result is due to the fact that the shift supervisor requires less verification than the bailbondsman. Drunks are not released until they are sober or until someone agrees to take responsibility for them. As a matter of policy, the shift supervisor will not release a suspect who does not cooperate.

The writer examined the arrest records for January 1966, and the following results were found:

Offense	Arrests	Released by Police	Released by Bail	Held for Court
Non-Aggravated Assault	6	4	2	0
Theft	3	2	0	1
Vandalism	3	0	3	0
Disorderly Conduct	3	0	3	0
Drunk Driving	37	25*	9	3
Drunkenness	38	18	14	6
Miscellaneous	3	1	0	2
Totals	93	50	31	12

* one failed to appear.

[Some suspects were charged with more than one crime.]

RICHMOND: Richmond's procedure is not as formalized as the one followed in Sunnyvale. The suspect is taken to the police station where the booking officer interviews him and determines the offense with which he is to be charged. The suspect is then taken to the jail and is formally booked. After the suspect has become sober or calm, the jailer calls the supervising officer, and the latter releases the suspect if, after examining the arrest report, he feels that the suspect will appear in court on his written promise and will not be harmful to the community or to himself. One of the most important factors in this decision is whether the suspect has a permanent or semi-permanent address in the Bay Area.

If the supervising officer does not believe the suspect should be released, the suspect fills out an "O.R." form which is used by the judge in disposing of the case. In contrast to Sunnyvale, the "O.R." form is used only in the case of misdemeanors.

The writer examined the arrest records for January and February, 1966, and the following results were found:

Offense	Arrests	Released by Police	Released by Bail	Held for Court
Non-Aggravated Assault	27	7	17	3
Theft	4	4	0	0
Vandalism	7	4*	1	2
Weapons Crime	5	4	0	1
Vice	1	1	0	0
Disorderly Conduct	32	15	13	4
Drunk Driving	31	13	13	5
Curfew	10	10	0	0
Drunkenness	202	82**	35	85
Liquor Laws	8	4***	3	1
Miscellaneous	20	7	8	5
Totals	347	151	90	106

* 1 failed to appear. **13 failed to appear. ***2 failed to appear.

[Some suspects were charged with more than one crime.]

Of the 106 who were not released by the police, 36 had no address and were classified by the Richmond Police Department as "nomads."

CONTRA COSTA COUNTY SHERIFF'S OFFICE: A deputy sheriff issues a citation to almost any suspected misdemeanor unless the suspect cannot care for himself or is an immediate danger to the community. Before a citation is issued, a warrant check is run on the suspect, and if there are any outstanding warrants, the suspect is taken into custody. If a citation is not issued, the sheriff's office follows the same procedure as that followed by Richmond, with the exception that in Contra Costa County Sheriff's Office the "O.R." form is filled out for all suspects, including felons, who are not released. This procedure is being used principally by the sheriff's office in the Mount Diablo Municipal Court District. The writer examined the arrest records of this district for the first six months of 1966 and the following results were found:

Offense	Arrests	Released by Police	Released by Bail	Citation Issued	Held for Court
Non-Aggravated Assault	17	7	8	0	2
Theft	59	2	4*	50*	3
Vandalism	2	1	1	0	0
Disorderly Conduct	13	6	7	0	0
Drunk Driving	1	1	0	0	0
Curfew	4	0	1	3	0
Liquor Laws	12	0	3	9	0
Drunkenness	19	5	4	1	9
Miscellaneous	21	4	12	3	2
Total	148	26	40	66	16

* 1 failed to appear.

[Some suspects were charged with more than one crime.]

APPENDIX II

In 1965 the California Assembly Interim Committee on Criminal Procedure studied section 853.6 and made the following recommendation:

We suggest that an Attorney General's opinion be drafted and directed to all law enforcement agencies, including district attorney's offices, wherein the legal processes should be outlined and any court cases in question be brought to attention. That a *sample procedure* be drafted by the Attorney General's office and submitted to all law enforcement agencies for recommended adherence. Departmental policy and procedure appears to be the problem area [22 CAL. ASSM. INTERIM COMM. REP., No. 8 ON CRIMINAL PROCEDURE 102 (1965).]

The Attorney General's Office has not acted upon this recommendation.

Law enforcement officials in Contra Costa County studied section 853.6 and made the following recommendations:

- 1) Whenever appropriate, the person accused of a misdemeanor should be cited on the spot to appear in the appropriate court at a specific time and place.
- 2) In cases where the officer feels that the citation alone is not appropriate, the person should be arrested, booked and released after booking on his signed promise to appear in the appropriate court at a specified time and place.
- 3) Arrests where citations are not issued should be based on one or more of the following points:
 - a. Where there is an imminent danger that the violation for which the person is arrested will continue.
 - b. Where there is threat of danger to the law enforcement personnel or the public or to the individual by reason of his physical or mental attitude.
 - c. When the identity or place of residence of the person arrested cannot be properly ascertained and detention to obtain further identification is necessary, or
 - d. When there are other unusual circumstances which lead the arresting authority to conclude that release should be passed upon by a magistrate of the court.
- 4) When in the arresting officer's judgment, based on any of the points above in paragraph 3, he deems it necessary that the defendant be held for bail, he shall indicate why. This opinion will inform the court so that proper action may be taken. In each case where no release is permitted the suspect will be supplied with an "O.R." form. The officer's statement and the "O.R." form shall accompany the prisoner to court. [RULES OF THE CONTRA COSTA COUNTY SHERIFF'S OFFICE APPENDIX R.]